MR. SIPE: I will not feel compelled to use 30 minutes. Good afternoon, Chairman Nober, Vice Chairman Burkes, Commissioner Morgan. My name is Sam Sipe. I am here today on behalf of the Association of American Railroads. As you know, the AAR is a trade association that represents the interests of the nation's major freight railroads.

This proceeding is timely. The Board well knows, as Chairman Nober has mentioned, that there are more active rate cases pending now than there have been at any time since the coal rate guidelines were adopted in 1985.

We could have a very interesting discussion about why that is the case, but the subject of this proceeding is to identify procedures to expedite the rate cases that have already been brought and not, as I understand it, to explore why they are filed in the first place.

The only thing I will say on that subject is that the Board can satisfy itself what the trend on coal rates has been over the last decade. The Board can satisfy itself from data that the Board's staff has generated. The Board can look at the factual representations made in the records of the individual cases. And I think the Board will satisfy itself that we are not dealing with a problem here of an upward surge in coal transportation prices.

AAR's four largest members are all currently defending one or more rate cases. They are acutely aware of the burdens these cases impose and the disruptions to business that these cases impose.

We heard discussion this morning about a regulatory contact, but this is not an industry that is supposed to be fundamentally and pervasively a regulated industry. It is an industry that is supposed to function in accordance with the dictates of the marketplace to the maximum extent possible.

And our member railroads do not have large staffs of individuals whose role is to assist in regulatory litigation.

There used to be such people when I first started doing this work in the post-Staggers era. There were substantial in-house cost departments, cost men, as they were called, with no disrespect intended for anybody of a different gender.

They mostly were cost men. Those people don't exist at the railroads now. The people who work at the railroads are people devoted to running the railroad and trying to do so efficiently. So when one of these cases is brought -- and my clients are not looking to be defendants on a regular basis -- I will tell you when one of these cases is brought, it imposes major burdens and costs on us.

The rail industry wants to minimize those burdens while assuring that the processing of the cases results in a decision based on a fully developed evidentiary record. That is really the balance. Let's eliminate the burdens, but I think everybody wants to maintain the integrity of the decision process such that we have an evidentiary record that we can look to and say, "This decision was grounded in the facts."

Because we want to minimize those burdens, we support the Board's proposals that have been noticed and commented upon in the current phase of this proceeding.

We have also responded to the Board's suggestion for additional proposals about how these proceedings could be expedited. I will get to that in a few minutes.

First, very briefly since we have said it in our comments and in the written testimony, we support all three aspects of the Board's proposals. Regarding mediation, we agree with the comments that have been made this morning from various parties that mediation is not a panacea. I wouldn't predict that it is going to result in a negotiated solution in most cases.

I think mediation will depend in large part for its success on the quality of the mediator. People who are experienced with mediation, who know how to move parties away from what appear to be intransigent positions, will have more

success at this than people who are not skilled mediators.

We do think the mediator ought to be familiar with the statutory scheme and the overall standards of the coal rate guidelines. I think it is unrealistic to expect that a mediator would be expert in stand-alone costs, but somebody who understands the general regulatory scheme that he or she is relating to in this mediation process would be valuable.

We urge the Board to identify accomplished mediators. We also strongly urge that the Board if it adopts mediation call for the participation of responsible business personnel with authority to settle the case in the mediation process.

The lawyers are not going to persuade each other that their cases are without merit, but business people listening to an objective, neutral third party will sometimes hear something different from what they have heard from their own counsel. And it may resonate differently.

A mediator, even if he doesn't know how the Board is going to decide a particular stand-alone cost case, can highlight for the parties the risks involved in litigation, which can have outcomes for either party vastly different from what they expect going in. So, although we don't expect that mediation is going to make these cases go away, we think it is a worthwhile effort to pursue under the guidelines the Board has suggested.

We do not think it would be appropriate for the Board to adopt a standard requiring the establishment of a common carrier rate any earlier than the law currently provides.

That period leading up to the establishment of a common carrier rate is usually a period when the parties are trying to negotiate a new contract. And we don't think it would make sense to truncate that process of negotiation just to begin mediation.

Regarding Board-staff involvement in resolving discovery disputes, AAR agrees it would be appropriate to have staff involved in deciding discovery disputes. There was some discussion this morning that staff involvement at the outset of

the discovery process could help shape and focus that process. I believe we would find that to be acceptable if handled in the right way.

There is some variance of views among AAR's individual members regarding the specifics of implementing the new rules for motions to compel and so forth. And I will let the individual members speak to that.

Regarding the new, more stringent discovery standards, AAR strongly endorses the adoption of the new discovery standards that the Board has proposed. There is no doubt -- and you haven't heard anything different this morning -- that railroads disproportionately bear the burden of complainants' broad and far-reaching discovery requests.

AAR noted in its February 21 written testimony the standard that the Board is proposing here. And I am now quoting from the same page Mr. McBride referred to this morning of the coal rate guidelines decision.

The standard the Board is proposing here is a clear, demonstrable need for the information. That is essentially the same standard that the ICC contemplated when it adopted the coal rate guidelines: a real, practical need for the information.

As we understand it, all the Board is doing here is seeking to return to the concept of discovery that was embodied in the coat rate guidelines. The railroads are not going to use the new discovery standards as an excuse or pretext to litigate over motions to compel. We know what we are required to produce the essential information that the shippers need. It's traffic information. It's information about our costs, our joint facilities, our track configuration.

What we object to is being asked for the same information in myriad different formats, being asked to go through and run computer programs so we can extract information from our databases that might never be used in the cases. There's a balance here that the Board can and should strike. And

we think the proposed new standard points in the right direction.

Shippers' argument in favor of the status quo is, frankly, counterintuitive. They haven't offered concrete proposals until they responded to the questions about staff involvement for making discovery more manageable. But clearly that is what we all understand we need to do.

I want to turn briefly and spend a few minutes talking about the alternative proposals that AAR suggested in its recent written comments as proposals, additional proposals, that could expedite these cases.

We realize that such proposals were not noticed by the Board and presumably would not be adopted at this stage of the proceeding without formal notice and comment, but we understood from the Board's notice of the hearing that the Board was interested in hearing some additional suggestions. And that's he spirit in which we offer it.

We are not offering them as detailed, tailored, ready-to-implement rules. We are offering them as comments that we think ought to be explored.

One of those suggestions is initial disclosures by the complaining shipper. The reason that this might make some sense is that it goes directly to reducing the discovery burdens. The complaining shipper is the one who knows for sure that it is going to bring a case.

And when it files its complaint, it has a sense of where it is headed in the litigation. It wouldn't be burdensome at that point for the shipper to disclose information regarding market dominance, which is something it has to prove. It wouldn't be burdensome at that point to disclose future coal utilization plans and transportation plans.

We think limited threshold disclosures would simplify the process. We also think that a standard period covered by discovery requests -- and the ones we proposed are one year for variable cost information and as a general matter two years for

the major categories of stand-alone cost information -- could help limit discovery and make it less burdensome.

The proposal we have made that I think may have been understood but has by far the most far-reaching potential impact is our proposal that the Board should not require or expect as a matter of course that the parties file movement-specific variable costs in these coal rate cases.

We are not ruling out the use of movement-specific variable costs when it turns out that something in the case actually turns on it. If, indeed, it is a close question as to whether the challenged rate exceeds the jurisdictional threshold, then movement-specific costs can be developed.

If, indeed, it turns out that a rate prescription turns on a precise calculation of variable costs, then we would agree that movement-specific variable costs should be developed. But we think that in many cases, there is no need for these detailed calculations, which, in fact, are the preeminent source of the discovery disputes we have had in the recent cases.

If the Board goes back and looks at the various areas that have been the subject of most controversy in the recent cases, I think you will find that the majority of them at least have related to requests for data that the shipper would use to develop movement-specific variable costs. We think you don't need to do that in the first instance.

URCS variable costs were developed for regulatory costing purposes. The Board went through, the Board's predecessor, the ICC, went through, an elaborate procedure to develop URCS variable costs as required by statute. And they ought to be good enough in many, if not most, cases to let the Board know whether the challenged rate exceeds the jurisdictional threshold.

If that is the case, it is quite possible that we would never need to get to movement-specific variable costs in a stand-alone rate case, either because the rate is found not to be

unreasonably high or because the Board finds that the rate is constrained by the SAC constraint, but the SAC constraint is well above the jurisdictional threshold.

I would note that that was certainly the expectation of the ICC when it adopted the coal rate guidelines in 1985, that there would be substantial differential pricing on these coal movements, that even if a rate were found to be unreasonably high, it might be substantially above 180 percent, as the statute, indeed, explicitly contemplates.

So what we are saying is you can avoid potentially in many cases a major, major source of delay and controversy by relying in the first instance on URCS variable costs that do not incorporate elaborate movement-specific adjustments.

Two other proposals that we made. One I'm glad to say seemed to meet with some at least qualified support from the shipper interests is that the Board could hold a technical conference. And our thought was that this would be or could be a procedural step that would facilitate the Board's own decision-making.

I don't know exactly how the Board decides these cases, and I certainly don't presume to advise the Board as to how it should decide these cases. So we may be off base here. But it may also be the case that when the Board staff is confronted with these voluminous records in stand-alone cost cases, hundreds of pages of narratives and exhibits with references to hard copy work papers and then below that level electronic work papers, that somebody working on the decision could profit from cutting through the complexity of the record in a conference-like format with the witnesses present so they could answer questions. And we would view that as being a process that could be most helpful at the stage when all of the evidence has been submitted.

Finally, a brief word about our proposal that the Board should try to find ways to make the records in these cases less of a black box inaccessible to the public. It is very true that

the railroads for reasons that the Board will appreciate have to denominate certain information as highly confidential.

Traffic information, in particular, is highly confidential, commercially sensitive, and indeed recognized by the statute as information that can't be disclosed without certain restrictions and for good purposes.

Railroads believe that the process of designating everything as highly confidential has gone way too far. As the practice has now evolved, it impedes the ability of in-house personnel, both lawyers and business persons, to assess the case they're responsible for managing, which is very difficult for them. It also makes it very difficult for the public to understand what has actually gone on in a stand-alone cost case.

The Board issues a decision at the end of the day which discloses only information that the Board can disclose, but much of the parties' reasoning and evidence really remain unseen by interested members of the public because it is all filed under seal. We think there are reasonable steps that could be taken to minimize the reliance on information filed under seal.

That is all I have to say at this stage. I will look forward to responding to questions when the panel has completed its remarks.